In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of THE HALE COMPANY, a corporation, against INTERNATIONAL TRADING COMPANY OF AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE, a National Banking Corporation, Garnishee Defendant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF DEFENDANT IN ERROR

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STATEMENT

There was no contractual relation, impliedly or otherwise, between the International Trading Company of America, a corporation, and the defendant

in error, The National City Bank. At no time was the bank indebted to the Trading Company, nor did it ever hold any money that was subject to a writ of garnishment on a judgment against that company.

The rights of the parties involved in this action arise out of a letter of credit issued by the defendant in error for the account of Frank Waterhouse & Company of Seattle, Washington; said letter of credit being No. 1128, together with the guaranty of said Frank Waterhouse & Company appearing upon the back of said letter of credit. This letter of credit and guaranty are as follows:

"LETTER OF CREDIT NO. 1128
THE NATIONAL CITY BANK
of Seattle.
Seattle, Washington, May 17th, 1920

$ 65,100.00)
128,100.00) U. S. Currency.
210,000.00)

Kelly & Co., Ltd.,
Hong Kong, China.

"Dear Sir:

"We hereby authorize you to draw on The National City Bank, Seattle, Washington, at 30 days sight for acount of Frank Waterhouse & Co., of

Seattle, Wn. for any sum or sums not exceeding in all
Sixty-five thousand one hundred
One hundred twenty-eight thousand one hundred
(1) Two hundred ten thousand . . . DOLLARS for cost of merchandise to be shipped to Seattle, Wash., covering 155; 305: 500 tons *standard white granulated* sugar packed in double bags, quality net shipping weight guaranteed by Lloyds and with Hong Kong government certificates of inspection and analysis.

"The drafts negotiated under this credit must be endorsed hereon and bear the clause 'Drawn under Credit No. 1128 of the National City Bank, Seattle, Washington, dated May 17, 1920' and advice thereof, in original and duplicate sent to the National City Bank, Seattle, Washington, accompanied with invoice.
Consular certificates and entire set of negotiable bills of lading made out to order of the shipper blank endorsed.

"We hereby engage that drafts in compliance with the terms of this credit will be duly honored if drawn on or before June 1st, 1920.

"Insurance provided by shipper.

"Your obedient servants,

THE NATIONAL CITY BANK,

H. G. HOTCHKISS,

Cashier

Entered folio

H. WITHERSPOON,

Vice-President."

"GUARANTY

Seattle.

"To the National City Bank,
Seattle.

"Having received your letter of credit No. __ a copy of which is on the other side hereof I/we do hereby agree to its terms, and in consideration thereof, do bind myself/ourselves to pay to you a sufficient sum in Dollars, United States currency, in this city, to cover any drafts drawn and negotiated in virtue of said credit together with commission at_____of one per cent.

"I/we hereby give you specific claim and lien on all goods and merchandise and proceeds thereof, for which the negotiators of drafts drawn in virtue of said Credit and/or the (13) National City Bank and/or its correspondents may have paid or for which they may have come under any engagements in virtue of said credit, all policies of insurance on such goods and merchandise to an amount sufficient to cover all advances and engagements under said credit, and all bills of lading given therefor, with full power and authority to take possession and dispose of the same at your discretion, at private or public sale, with or without demand of performance or notice of sale to me/us or to the public, for your security or reimbursement, including commission for sale and guaranty and all expenses; unless on my/our application I/we provide payment in some other way satisfactory to you.

"I/we pledge to you as security for all and any indebtedness or liability existing or that may hereafter arise from me/us to you under said letter of credit, all of said securities, and we further stipulate that all securities which shall be received hereunder may be held, and applied by you to secure any and all indebtedness or liability existing or which may hereafter arise from me/us to you under said letter of credit.

"Marine Insurance on said goods and merchandise shall be effected in _____ with such company or companies and for such amount as you may direct; all policies shall be assigned to you, and loss, if any, shall be made payable to you in currency of the United States of America.

"In the event of the goods or merchandise being shipped by or on board of a vessel carrying the flag of a nation at war, we hereby agree to insure against war risk, and failing so to do, you are authorized to effect such insurance at my/our expense.

FRANK WATERHOUSE & CO.
By R. D. Smalley,
Treas."

(R. pp. 12-15.)

The guaranty was signed by Frank Waterhouse & Company after the last amount had been included in the letter of credit. (R. pp. 68-69.)

Kelley & Company, Ltd., to whom the letter of credit was addressed, shipped in one undivided ship-

ment 585 tons of sugar packed in 5258 bags, which sugar arrived in Seattle July 16th, 1920, shipped to the order of Kelley & Company, Ltd. (R. p. 8.)

The ocean bills of lading, invoices and draft were sent from Hong Kong to the National Bank of Commerce, Seattle, who delivered the bills of lading and invoice, and presented the draft to the defendant in error on June 23rd, 1920. (R. p. 62.) The draft was accepted, payable thirty days later. The sugar was delivered and shipped to purchasers in Chicago under railroad bills of lading; 500 tons going to Montgomery Ward & Company and 85 tons going to John Sexton & Company.

The draft Kelley & Company, Ltd., issued against the letter of credit, No. 1128 issued by the defendant in error covering said sugar, was for $244,970.46. The duty on the sugar amounted to $15,441.30, making a total cost of the sugar of $260,411.77, which the defendant in error paid.

It will be noted that the sugar came in under one shipment packed in 5258 bags for the entire quantity, and one draft. Kelley & Company, Ltd., was not at all concerned in any subsequent distribution of the sugar; nor was there any thought, or suggestion, so far as Kelley & Company, Ltd., was concerned, as to the ultimate destination of

the sugar. It was selling 585 tons of sugar and drawing a draft for the entire purchase price against the letter of credit No. 1128 issued by the defendant in error. The defendant in error, having paid out against the letter of credit the said sum of $260,411.77, both under the express terms of the letter of credit and under the guaranty accompanying the same, and by virtue of acquiring and holding the documents accompanying the draft, was entitled to and had a specific claim and lien on all the goods and merchandise and proceeds thereof to an amount sufficient to cover all advances and engagements under said letter of credit. The shipment to Montgomery Ward & Company realized the sum of $233,970.52. This, the defendant in error was entitled to hold against its advances. The sale to Sexton & Company was not consummated; the fall in the price of sugar caused unscrupulous buyers to seek technical means of avoiding their obligations. The defendant in error was, therefore, compelled to dispose of the sugar shipped to John Sexton & Company at Chicago, at the best price obtainable. It realized the total sum of $17,-896.32, out of which it was required to pay freight and demurrage, aggregating $1382.95. The account therefore stood as follows:

Advances	$260,411.77
Receipts	250,483.89
Deficit	$ 9,927.88

That is, the defendant in error has not been reimbursed for the advances it has made against said letter of credit within $9,927.88. This plain recital of the facts shows clearly why the trial court dismissed the garnishment proceedings, and why the court made findings of fact to the effect that at the time of the service of the writ, or at any time prior to answer, the defendant was not indebted in any amount whatsoever, nor had in its possession any property belonging to the International Trading Company of America.

ARGUMENT

A perusual of the answer of the garnishee defendant discloses its obvious intent and purpose to bring all of the facts in its possession to the attention of the court, and it must be conceded that the answer contained a full, frank and fair statement of all such facts. (R. p. 6 et seq.) The

garnishee defendant might have simply answered "no funds and no effects," and this law suit would not have been commenced. But the answer shows its disposition to be entirely fair with all concerned and to conceal nothing. At the time the eighty-five tons of sugar had not been sold and the garnishee defendant, knowing that if it should be sold for a sufficient price, that there would be money paid to Frank Waterhouse & Company, after the bank had been fully reimbursed, and, being possessed in a general way of the knowledge that International Trading Company had an interest in the contingent fund, it preferred to state the facts in detail. It is apparent that the claim of the plaintiff in error grew out of his construction of the form of the answer of the garnishee defendant and not out of any state of facts. He concluded to interpret the language of the answer to mean that the garnishee defendant owed his judgment debtor, hence the controverting affidavit and this suit.

The plaintiff in error contends:

1. That because the sugar was sold to different parties that they were severable, separate and distinct contracts, and the plaintiff in error is entitled to treat each sale of sugar as a separate and distinct contract and to maintain that if there

was a profit on one sale and a loss on the other that the plaintiff in error should be entitled by the writ of garnishment to hold the profit on the one, although there might be a serious loss on the other. The plaintiff in error by putting the cost of sugar in Hong Kong at so much per ton, calculates that there remained in the hands of the garnishee defendant on the sale of the Montgomery Ward & Company's sugar the sum of $10,673.26, and calls attention to the answer of the garnishee defendant, but fails to call attention to that portion of the answer of the garnishee defendant reading as follows:

". . . . and there is still due this garnishee defendant for funds advanced and paid to said Kelley & Co., Ltd., in payment for the quantity of sugar sold to John Sexton & Company, as aforesaid, together with duty charges, interest, commission and disbursements, the sum of Thirty-seven Thousand One Hundred Twenty-four Dollars and Eighty-one cents ($37,124.81), together with interest thereon at the rate of eight per cent (8%) per annum from July 23, 1920, and also the sum of Five Hundred Dollars ($500.00) loaned to International Trading Company of America, as aforesaid, together with interest thereon at the rate of eight per cent (8%) per annum from July 15, 1920, until paid, all of which is secured by the excess fund of Ten Thousand Six Hundred Seventy-three Dollars and Twenty-six Cents ($10,673.26) here-

inabove referred to, the title to the quantity of sugar intended for said John Sexton & Company under the order bills of lading and the guaranty of said Frank Waterhouse & Co., hereinabove referred to." (R. pp. 10 and 11.)

The trouble with this argument is: First, there was but one letter of credit. It is true that that letter of credit was increased, but this increase did not make it other than one letter of credit for the aggregate amount of the sums. This was recognized by the party for whose account it was issued, Frank Waterhouse & Company, who signed it only after the last increase had been incorporated in the letter of credit, and under this letter of credit the defendant in error was entitled to hold not only the documents until its advances were paid, but also by virtue of the guaranty by the party for whose account the letter of credit was issued, Frank Waterhouse & Company, it had a specific claim and lien on all goods and merchandise and proceeds thereof drawn in virtue of said letter of credit as security for all and *any indebtedness* or liability existing, or that may thereafter arise under said letter of credit.

So, even if there were a separate sale, it would be wholly immaterial in this case, but there was but one shipment of sugar, one ocean bill of lading

and one set of documents. Consequently, it would be inequitable and contrary to the express terms of the letter of credit and defendant in error's rights thereunder, and said guaranty, to attempt to segregate the subsequent sales of said shipment of sugar.

Plaintiff in error contends also that the defendant in error must permit it to calculate what profits it made on the Montgomery Ward & Company's sale and to claim that, irrespective of the loss sustained on the John Sexton & Company's sale. There are two answers to this. First: The defendant in error had no contract with the International Trading Company of America, while it was, no doubt, cognizant of the fact that the International Trading Company of America was ultimately interested with Waterhouse & Company in the profits of the deal, it had refused to deal with or to extend to that Trading Company credit and carried on its transactions and issued its letter of credit solely for the account of Frank Waterhouse & Company.

Whatever rights the Trading Company had, or has in the matter arise out of its contractual relations, not with the defendant in error, but with Frank Waterhouse & Company. Under the letters (R. p. 29) to the International Trading Company

from Frank Waterhouse & Company, the said Frank Waterhouse & Company agreed, *after all drafts had been paid*, to render an accounting to the Trading Company, deducting from the gross profits any expenses, and giving to the said Trading Company two-thirds of the remaining balance. If Frank Waterhouse & Company failed and neglected so to do, the International Trading Company has its rights against Frank Waterhouse & Company. The defendant in error declined and refused to extend credit to the International Trading Company because that company had no credit; was not responsible. That it was justified in so doing is demonstrated by the very facts in this case, to-wit; that in July, 1920, a judgment was obtained against the Trading Company for some Fifty-two Hundred dollars. The Trading Company, without any credit and without any responsibility, apparently made some arrangement with Frank Waterhouse & Company whereby it would divide the profits on the sales of sugar on the understanding that Frank Waterhouse & Company would finance the deals. The defendant in error was willing to issue the letter of credit to Frank Waterhouse & Company, a well-known and established concern, and to receive its guaranty, as endorsed upon the

back of the letter of credit. It would not, and did not, deal with the International Trading Company and was under no obligation to it in any of these transactions.

The next reason why the Trading Company is in no position to object to the very just and proper action of the defendant in error in withholding all funds received from the Montgomery Ward & Company's sale until it was reimbursed for its advances, is because Frank Waterhouse & Company, for whose account the letter of credit was issued, and who was the only party having any legal standing or transactions with the defendant in error, examined the documents accompanying the draft, and made no objections to the defendant in error paying the draft. It is true that such examination appears to have been directly after the draft was accepted, but a considerable time before payment. Whether the defendant in error might have protected itself against the payment of the draft is not material to inquire. It is sufficient to say that the party for whom the letter of credit was issued, and whose guaranty was involved in the transaction, made no objection, or protest in any way, shape or manner to the payment of the draft, or to the acceptance of the sugar.

By all rules of law, Frank Waterhouse & Company would be, and was estopped, but the record discloses that Frank Waterhouse & Company never has repudiated its action in accepting and approving the documents.

It is contended in this case that after it became apparent that there might be a loss on the Sexton & Company's shipment that Waterhouse & Company entered into an agreement with the defendant in error that any loss on the whole transaction would be shared equally between the bank and Frank Waterhouse & Company, for whom the letter of credit was issued. In this case there was a loss, as shown by the figures heretofore copied into this brief, of $9,927.88. Therefore, Frank Waterhouse & Company, after the whole transaction was over, instead of repudiating the acts of the defendant in error in accepting the sugar and the documents, went further, ratified the same by agreeing to stand one-half of that loss, which would still leave the defendant in error a loser in this transaction of one-half of $9,927.88. The record also discloses that Frank Waterhouse & Company has never claimed that it was entitled to any profit on the Montgomery Ward & Company's sale independent of any other sale of the sugar. There is no claim

or proof, or contention of any fraudulent conspiracy or collusion between the defendant in error and Frank Waterhouse & Company; nor was there any.

This non-conformity of documents is a pure afterthought; was not even suggested at the commencement of the trial, a straw at which the plaintiff in error grabbed. As the court said in his opinion:

"There was nothing in this case at the time it opened, in your opening statements, to apprise the court of the importance of the question of the conformity of these documents to the letter of credit. Nothing was said in opening this case that it was claimed that any part of this shipment did not measure up to the contract made by the letter of credit."

The plaintiff in error did not consider it of sufficient importance to mention it in his opening statement. The court of necessity could not in this garnishment proceeding determine whether or not the defendant in error had acted legally in accepting those documents; that is a matter that would have to be adjudicated between the defendant in error and the party for whom the said letter of credit was issued, Frank Waterhouse & Company. It would be impossible to determine that issue in this garnishment proceeding. The question of

damages could not be litigated in this proceeding. The plaintiff in error's position is:

"I claim that the bank by its negligence has damaged Waterhouse; I fix the damages at so much; Waterhouse owes my debtor; Waterhouse and International need not even be heard in the matter; the bank may pay me."

It is elementary also that a writ of garnishment would not issue in an action based on a tort, at least prior to judgment, and as Waterhouse & Company has taken no steps whatever, it would now be barred by the Statutes of Limitation—more than three years having elapsed.

The logic of the plaintiff in error that the defendant in error was negligent in receiving the sugar and accepting the draft in regard to that portion of the sugar shipped to Sexton & Company destroys itself. Conceding that the sugar shipped, as stated in the documents, was "granulated white sugar, Java No. 24" and that the letter of credit of the defendant in error called for "standard white granulated sugar," the letter of credit issued to the account of Montgomery Ward & Company by the First National Bank of Chicago (R. p. 32), called for "standard white sugar" and the letter of credit issued by the Corn Exchange National

Bank of Chicago for the account of John Sexton & Company called for "standard white granulated sugar," then the defendant in error was equally negligent in accepting the sugar that was shipped to Montgomery Ward & Company. If it was negligent in the one instance, it was equally negligent in the other. The plaintiff in error is in no position to seek to take advantage of the shipment to Montgomery Ward & Company and in the same breath repudiate the shipment to Sexton & Company. It cannot "blow hot and cold." It cannot ratify the good and repudiate the bad. If it repudiates one, it must repudiate the other. All this goes to show that the defendant in error, bank, was acting in good faith in accordance with the wishes and satisfaction of Waterhouse & Company and, as the court below said in his opinion:

"Regarding this question of the documents: If Waterhouse & Company were guarantors and nothing else, there might be and would be a more serious question in the case. Of course the suit between the National City Bank and the Seattle National Bank is another story. What makes this governed by another rule is this fact, that is, that Waterhouse & Company were interested not only in the documents but they were interested in the sugar; and although the National City Bank had accepted the Kelley draft, yet I am convinced from the evidence in this case that Waterhouse & Company,

when the documents were presented—and the court must conclude that they had notice that they did not exactly conform—assuming that they did not conform, that it was then the duty of Waterhouse & Company, representing its own interest and that of the partnership or the other company associated with it in the enterprise—it was then the duty of Waterhouse & Company to notify the bank that the sugar belonged to the bank, that Waterhouse & Company had no further interest in it and they could dispose of it as they pleased, but instead of that it appears clear to the court that they were willing to take a chance on the sugar yet. Well, they could not do that and later, when there was a loss on the sugar, repudiate the whole thing and come in and take the other tack." (R. pp. 74-75.)

That is, Waterhouse & Company with whom the defendant in error was dealing, could not if it had desired, and it is clear that it did not desire, repudiate the act of the defendant in error in accepting the sugar, as the court said it was willing to take a chance on the sugar, and they could not do that, and then where there was a loss, come in and take the other tack.

That plaintiff in error himself lost the thread of this argument is indicated by the fact that twice on page 3 of his brief and again on page 13 he states that the Montgomery Ward & Company letter of credit called for "white granulated sugar"

and on this statement he bases much of his argument. This letter of credit is plaintiff's exhibit No. 2 shown on page 32 of the record. It does not call for "white granulated sugar" but for "standard white sugar." Notwithstanding the effort of the plaintiff to attach great importance to the omission of the word "standard" from the Montgomery Ward & Company letter of credit, his error of statement is so manifest that there could have been no intent to mislead as he immediately refers to the exhibit and the record which show that the word "standard" was *not* omitted from the Montgomery Ward & Company letter of credit.

And, as to the relation of Frank Waterhouse & Company to the International Trading Company, the court in its opinion said:

"Whether this arrangement between Nelson and Waterhouse & Company is treated as a partnership or a joint adventure or joint enterprise, or whatever you may designate it, I am convinced that Waterhouse & Company was the fully authorized agent of the International Trading Company to make whatever arrangements were necessary with the bank in order to secure finances. That being true, this guaranty that was put on the back of the letter of credit, was the final step in securing the money. If it is not looked at as contemplated in the first borrowing, the agency would authorize

Waterhouse & Company to guarantee and pledge and give a lien on the whole proceeds of the transaction to secure the bank in making the arrangement for the money, and I find that everything was pledged by that guaranty on the back of the letter of credit."

Manifestly, whatever relations existed between Waterhouse & Company and the International Trading Company, the situation was such that whatever Waterhouse & Company did was binding and controlling on the International Trading Company.

It is contended that somehow or other, the bank by loaning $500.00 to the International Trading Company and accepting as collateral to said note an order on Frank Waterhouse & Company to pay said note out of the Montgomery Ward & Company's sale, has changed the legal situation of the parties. No stretch of the imagination can accomplish that fact in regard to that matter. The bank lent the International Trading Company $500.00; took its note for it. The International Trading Company gave an order on Waterhouse & Company, directing Waterhouse & Company to pay out of its profits that it would get out of the Montgomery Ward & Company's sale, said note.

Certainly, that did not affect the situation of the parties and, as the court said in its opinion:

"It has been argued that afterwards, in borrowing the $500.00, there was a recognition that these were separate deals and separate transactions to be kept separate in every way. That does not follow. If the International and Nelson wanted to pledge a part of what was to be realized out of one of these deals with his customer, for his own convenience, that could be done, without showing any intention to recognize the guaranty on the back of the letter of credit in any other way than pledging everything."

A plaintiff in garnishment can get no better right to the debt garnisheed than his debtor has.

Bellingham Bay Boom Co., v. Brisbois, 14 Wash. 173.

Barkley v. Kerfoot, 77 Wash. 556.

Puget Sound Machinery Depot v. Pearson, 99 Wash. 364.

Fidelity Trust Co. v. New York Finance Co., 125. Fed. 275.

Allen v. Aetna Life Insurance Co., 145 Fed. 881.

North Chicago, etc. v. St. Louis, etc. 152 U. S. 596.

In Brisbois' case the court said:

"But if the debt sought to be garnisheed is not at the same time in fact due and owing from the

garnishee to the judgment debtor, it necessarily follows that there is nothing upon which the writ can operate. The garnisher can get no better right to the debt garnisheed than his debtor has, and if the latter has no right in or to the debt, the former acquires none by his garnishment."

As the defendant in error was not indebted to the Trading Company, the debtor of the plaintiff in error, at the time the writ was served and the answer of the garnishee defendant submitted, the plaintiff in error's action must fall.

We respectfully submit that there was but one decision that could have been made by the trial judge, and that was the one he made, dismissing the garnishment proceedings; otherwise, a very gross injustice would have been inflicted upon the defendant in error by a party with whom it had no dealings and was under no legal obligation.

Respectfully submitted,

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